1959

George Popp v. Arie Peter Roth and Gerarda Roth : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE POPP,

Plaintiff and Appellant,

vs.

ARIE PETER ROTH and

GERARDA ROTH, his wife,

Defendants and Respondents.

Case No.
8956

BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

In accordance with appellant's brief, the appellant, George Popp, will be referred to herein as plaintiff, and the respondents, Arie Peter Roth and Gerarda Roth, will be referred to as defendants.

In plaintiff's habeas corpus proceedings the Court determined that the custody of the female minor child by the defendants was legal and should

remain with the defendants and that the plaintiff had no right to custody. In so ordering, the Court found: (R. 190)

(1) That the defendants have legal custody pursuant to an order of Court made and entered in connection with a proceeding for the adoption of an illegitimate minor child.

(2) That the child is illegitimate.

(3) That the plaintiff is not the natural father of the child.

(4) That the plaintiff is not a fit and proper person to have custody of the child.

(5) That the best interests and welfare of the minor child require that she remain in the custody of the defendants.

STATEMENT OF FACTS

Defendants agree essentially with the facts stated in appellant's brief as far as they go, but a more complete statement of facts is required for an understanding of the action of the Court below.

It is undisputed that the child involved herein was illegitimate at the time of its birth. Further, the plaintiff does not dispute that defendants have complied with the provisions of Chapter 30, Title 78,

U.C.A., 1953 pertaining to the adoption of an illegitimate child.

Plaintiff is thirty-four years of age (R. 64). The natural mother of the child, Winifred Fleischmann, is twenty-one years of age (R. 64). Both came to the United States from West Germany but at separate times. The plaintiff came in July, 1955 (R. 44). Winifred came February 1, 1955 with her mother and sister (R. 100). Plaintiff has known Winifred ever since she was a young child of ten years (R. 40) and claims to have had illicit relations with her in Germany when she was seventeen years of age (R. 43, 64) and that the child involved herein is the issue of such relations (R. 46).

During this time, plaintiff was married to another woman and had two living children by her (R. 64-65).

At the time the child was conceived in October 1954, Winifred was not married (R. 84, 94). She denies having sexual relations with plaintiff at this time (R. 99). She states that the natural father of the child is an American soldier in whose home she was living and working at the time (R. 95).

Plaintiff has denied that the child is his (R. 101, 112). The child was born to Winifred at Peoria, Illinois, on June 15, 1955. She was not married to plaintiff or any man at that time (R. 84, 95). The

name given the child by Winifred was her maiden name, Fleischmann (R. 17).

Plaintiff has never entered into a valid marriage with Winifred because his divorce from his first wife was not effective at the time he attempted to enter into such a marriage in Peoria, Illinois on July 23, 1955 (R. 22).

Plaintiff's German divorce decree is dated June 28, 1955 (Exhibits D-3, D-4). This was after the child was conceived (R. 84, 94, 66, 67) and after the birth of the child (R. 66-67). The German divorce decree by its terms did not become effective until November 21, 1955 (Exhibits D-4, D-8, R. 104, 106, 107, 163, 164). Plaintiff left his two children in Germany fatherless (R. 66-67) and traveled to Peoria, Illinois where he attempted to marry Winifred on July 23, 1955. The date of this pretended marriage is not disputed. It was before the effective date of November 21, 1955 of the German decree, and plaintiff's first wife was and still is alive (R. 186).

Subsequent to this pretended marriage to Winifred, and at the insistence and for the benefit of the American sponsors of these aliens (R. 112-113), there was an attempt to change the name of the child by an Illinois statutory proceeding. The statute in this proceeding requires that there be a valid *intermarrying* of the applicants as a basis for it. (Statute cited

in Argument). It is upon this attempted marriage and statutory proceeding that the plaintiff bases his claim to being the legitimate father of this child. However, it is apparent from the evidence that plaintiff's real purpose in asserting any claim to the child is to use her as a pawn in an effort to reach the mother, Winifred, who had left him, and to try to get her to come back (R. 69, 67, 85, 86, 107, 110).

The evidence indicates that the attempted marriage of plaintiff and Winifred was a thing of convenience for them and their American sponsors (R. 96, 99, 100). Their life together was turbulent. The evidence shows that from the time the child was a few weeks old, the plaintiff frequently beat her black and blue on the face and body and was cruel and abusive to her and that on occasions the neighbors had to intervene (R. 73, 74, 85, 88, 91, 101, 102, 119, 120), and once he held her under water (R. 123). The plaintiff has neglected the child (R. 103, 112, 118, 121). He shows great partiality to a younger child he knows to be his own (R. 89, 90, 91, 119). He did not attempt to support the child (R. 84, 85). Winifred's sister testified that plaintiff has beaten and neglected the child ever since she was a few months old (R. 169-171).

Winifred left the plaintiff in Peoria in September, 1957, and took the child involved herein to Salt Lake City on September 3, 1957 (R. 108). She left

a younger child, Elizabeth, in the care of some friends in Peoria (R. 67).

On September 29, 1957, Winifred placed the child with defendants in Salt Lake City (R. 108). This was after Winifred had notified plaintiff that she was placing the child for adoption (R. 81). On October 23, 1957, after consulting with her own independent legal counsel (R. 19, 81), Winifred executed an affidavit affirming that she had voluntarily delivered the child to the defendants on September 29, 1957, for the purpose of adoption, relinquished her rights to the child and consented that she could be adopted by the defendants. Further, on the hearing of the defendant's Petition for Adoption on October 23, 1957, Winifred appeared in Court with her own independent legal counsel, testified that the plaintiff was not the natural father of the child, relinquished her rights in the child to the defendants, and executed the necessary consent to adoption (R. 16-18). At that time the defendants also testified and executed the necessary consents (R. 20-21).

Pursuant to the adoption proceedings, the defendants have had custody of the child in their home continually for nearly eighteen months since September 29, 1957 (R. 128). The child was sick, nervous and maladjusted upon coming into the home of the defendants (R. 85, 129). Because of the defendant's treatment of the child she was afraid of him and other men (R. 80, 85, 108, 129).

The undisputed evidence is that the child is now in good health, happy, and well-adjusted (R. 108, 110). The defendants are greatly attached and devoted to the child and love her as their own. They are people of good repute, and they have adequate income and facilities to maintain and care for the child (R. 128-133).

STATEMENT OF POINTS RELIED UPON

I. **The minor child involved herein is illegitimate.**

II. **There has never been a legitimation of the child because there never was a valid marriage.**

III. **Defendants have complied with the statutory requirements for the adoption of an illegitimate child.**

VI. **Plaintiff is not the natural father of the child.**

V. **Plaintiff is not a fit and proper person to have custody of the child.**

VI. **The best interest and welfare of the child require that the defendants retain custody of the child.**

ARGUMENT

Point I.

The Minor Child Involved Herein Is Illegitimate.

It is undisputed that the natural mother was unwed at the time the child was conceived and at the

birth of the child. Further, it is undisputed that the plaintiff was married to another woman at the time the child was conceived and born.

Point II.

There Has Never Been a Legitimation of the Child Because There Was Never a Valid Marriage.

Any possible legitimation of the child required a valid *intermarrying* of plaintiff and the natural mother. The above facts and the argument below show that plaintiff has never entered into valid marriage with the mother of the child.

If any legitimation of the child occurred, it would had to have been in Illinois where the plaintiff and natural mother and child resided and where the plaintiff still resides. Plaintiff relies upon the following Illinois statute:

> "An illegitimate child whose *parents intermarry* who is acknowledged by the father as the father's child shall be considered legitimate." (Ch. 3, Sec. 163, Ill. Ann. Statutes)

This statute presupposes that the intermarrying persons be the *natural* parents of the child. The evidence in this case is that the plaintiff is not even the natural father of the child as will be discussed below, and, therefore, this statute is not applicable. The Illinois court has, in fact, ruled on its earlier

statute containing almost identical language that the establishment of parenthood under such a legitimation statute is a prerequisite. This question is discussed in the case of *Miller* vs. *Pennington*, 218 Ill. 220, 73 NE 919. The statute involved there was as follows:

> "An illegitimate child whose *parents* have intermarried and whose father has acknowledged him or her as his child, shall be considered legitimate."

The Court said in that case that in order to show legitimacy under that satute:

> "It was necessary for them to establish by the proof, three facts:
>
> (1) (That the persons seeking legitimamation) were the parents,
>
> (2) That the said parents intermarried, and
>
> (3) That 'the father' acknowledged them as his children."

A similar rule under a similar statute was announced in the California case, *in re Floods Estate*, 21 P. 2d 579, 217 Calif. 763, and is set forth at page 59, 10 C.J.S., *Bastards*, Section 11(b) as follows:

> "In order to establish a claim of adoption and legitimation, under the statutes described

above, claimant has the burden to prove (all) the essential elements of adoption and legitimation."

It is stated at page 68 of Section 12, 10 C.J.S., *Bastards*, that:

> "In general, the party who sets up the claim of legitimation by the intermarriage of the alleged parents of an illegitimate child has the burden to prove the existence of the essential elements of legitimation, as, for example, the alleged father's paternity of such person, the subsequent intermarriage of the parents, and recognition or acknowledgement by the alleged father."

Further, any attempted legitimation of the child under the Illinois statute relied upon by the plaintiff would be defective because there never was a valid intermarrying between plaintiff and the natural mother. The rule in this regard is stated in 7 Am. Jur.—*Bastards*, Section 58, page 666:

> "A statute providing that a child born *before* wedlock shall be made legitimate by the subsequent marriage of its parents presupposes a valid marriage, and it does not apply to a child whose father had not, at the time of the marriage, obtained a valid divorce from his former wife."

In the case of *Olmsted* vs. *Olmsted*, 190 N.Y. 458, 83 NE 569, affirmed in 216 U.S. 386, 54 L. Ed. 530, 30 S.

Ct. 292 pertaining to legitimation under a statute similar to the one involved here, it was held:

> "The statute relates only to such marriage between parents as may be lawfully made, and not to those which are polygamous, incestuous, or prohibited by law."

(A) The Plaintiff Was Not Divorced From His First Wife at the Time He Attempted to Marry the Natural Mother.

The terms of the German divorce obtained by plaintiff's first wife while plaintiff was still in Germany, provided that it was not to become effective until November 21, 1955. Therefore, plaintiff was under a legal disability to enter into a valid marriage with the natural mother on July 23, 1955.

The German divorce was heard June 21, 1955. The decree is dated June 28, 1955, and contains the following provision which was stipulated as being a correct translation from the certified copy:

> "II. It is hereby certified that the above Decree becomes legally *effective* as of November 21, 1955."

It was stipulated that the German Statutes referred to in the German Consul's letter of February 24, 1958 (Exhibit D-8) could be accepted as evidence of what the pertinent German law was at the time of the German decree and that the English transla-

tion set out in the same letter is correct. The English translation of these pertinent statutes as contained in this letter is as follows:

> "#5 Nobody may enter into a marriage before his previous marriage has been nullified or dissolved."
>
> "#20 A marriage is void if one of the spouses was legally married to a third person at the time of the marriage contract."
>
> "#41 The marriage is divorced by Court decree. The marriage is dissolved when the decree becomes *effective*."

Construing the language of the decree in the light of the German statutes, the trial Court held that the German decree did not become effective or dissolve the marriage until November 21, 1955, and until that time, the plaintiff was not divorced and was under a legal disability to enter into a valid marriage with the natural mother at the time he attempted to do so on July 23, 1955.

The result of these statutes is to postpone the effectiveness of the divorce until the required time has passed.

Reference is also made to the stipulated evidence that plaintiff's first wife is still living so that he had not acquired the legal capacity to marry the natural mother because of the death of his first wife.

It is submitted that any presumption that might exist as to the validity of the second marriage is clearly and convincingly overcome as a matter of law in view of the above facts, provisions of the decree and statutes, and the authorities immediately hereafter referred to.

(B) The Disability to Marry Created by a Divorce is Determined by the Law of the Jurisdiction of the Divorce and Follows the Person.

It is the universal rule that where a statute, by its express terms or by interpretation, provides that it postpones the effectiveness of the divorce during the interlocutory period, the plaintiff is under a legal disability to enter into another valid marriage during such period, and this disability attaches and follows the person wherever he may go. The rule in this regard is set forth in 32 A.L.R. page 1125 in which a leading case, *Heflinger vs. Heflinger*, 136, Va. 289, 118 SE 316, 32 A.L.R. 1088 is referred to and the rule is stated as follows:

> "If the effect of the provision of the statute or the decree of divorce is to postpone the dissolution of the former marriage until the lapse of the prescribed period, it is clear that a remarriage within that period will not be recognized or given effect in the state where the decree was granted, or, for that matter, in any other state, since, ex hypothesi, one of the parties at the time of remarriage

had not the status of an unmarried person. In *Heflinger vs. Heflinger*, the Court holds that a provision of the statute to that effect is part of the decree and within the full faith and credit provision of the Federal Constitution."

The rule in regard to the force and effect of an interlocutory judgment or decree of divorce is stated in Section 474, Page 579 of Vol. 17 Am. Jur. *Divorce and Separation*

> "An interlocutory judgment or decree of divorce does not sever the matrimonial bonds; only a final decree or judgment is effectual to dissolve the marriage and restore the spouses to the status of single persons *and to render each competent to marry again.* After an interlocutory decree and until the entry of a final decree, the marital relation continues as before, with the rights incident thereto. Marriage after the entry of a decree nisi and before final decree is therefore null and void, *notwithstanding it is contracted in another state.*"

The same rule is found in *Goodrich on Conflicts of Law*, Hornbook Series, 2d Edition, Pages 307 and 308 which reads as follows:

> "Under the divorce practice in some jurisdictions, an absolute decree is not first entered, but merely an interlocutory order or decree nisi, which is made absolute at some later date, if in the meantime the Court has

> not become convinced that a divorce should not be granted. Until this decree is made final, the parties are not divorced; a second marriage is bigamous, *because the first one still exists.*"

All of the Utah cases that have considered the force and effect of an interlocutory decree have held that the marriage relationship continues to exist until the expiration of the interim period. *Johnson vs. Johnson*, 207 P. 2d 1036; *Sanders vs. Industrial Commission*, 64 Utah 372, 230 P. 1026; *Hendrich vs. Anderson*, 191 F. 2d 242; *Anderson vs. Anderson*, 121 Utah 237, 240 P. 2d 966.

The following statement is contained in the Hendrich case:

> "Where interlocutory divorce decree was entered in wife's divorce action and decree provided divorce should not become final and absolute until expiration of six months from date thereof, status of husband and wife between parties continued until six months period has elapsed."

The Illinois courts hold that a marriage entered into during an interlocutory period of a divorce is absolutely void. Illinois does not now have a waiting or an interlocutory period for divorce. However, its rule in regard to this is clearly set forth in the case of *Stevens vs. Stevens*, 304 Ill. 297, 136 NE 785. Further, the Illinois law and attitude re-

garding prohibited marriages is contained in an express statute. *Ch.* 89, *Sec.* 19, *Ill. Ann. Stat.*, which provides that prohibited marriages are void even if the parties attempt to circumvent the prohibition by going out of the state.

The language of this Illinois statute is as follows:

> "If any person residing and intending to continue to reside in the state and who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

Plaintiff's brief contains some statements and cases regarding the lack of extraterritorial effect of prohibitions against marriage in divorce decrees. All of these cases can be distinguished from the authorities cited by the defendants herein. In all cases cited by the plaintiff, in support of this proposition, they deal with statutes which provide or have been interpreted to mean that they do not postpone the effectiveness of the divorce decree but merely prohibit a marriage within a stipulated time and makes such actions subject to penalty. The cases cited by plaintiff do not deal with divorce statutes which expressly defer or have been interpreted to defer the severance of the marriage relationship until the expiration of the interim period.

A fair reading and interpretation of the above referred to German statutes and the provisions of the German divorce decree clearly puts the decree and the German statutes in this latter category which suspend the operation of the divorce until the time has elapsed. Both plaintiff and defendant refer to and rely on cases cited in 32 A.L.R. beginning at 1116 and 51 A.L.R. 325. However, all these cases can be distinguished. Where the statutes involved in these cases expressly or by interpretation suspend the operation of the divorce and continue the marriage until the expiration of the intervening period, the status created thereby is given extraterritorial effect. In those cases which involve statutes which provide or have been interpreted to mean that the marriage is severed at the time of divorce and that the intervening period is a mere prohibition against remarriage, the cases generally refuse to give such prohibition extraterritorial effect. However, in many of these latter type cases, some courts grant extraterritorial effect to such prohibition.

The Restatement of the Law of Conflicts, expressly distinguishes between the laws which provide for an immediate final divorce but attach a period prohibiting remarriage and the laws which extend the marriage from the date of entry of the decree until the lapse of a stipulated time. The rule in this regard is stated at page 194 in Comment (a) under Section 130 in the *Restatement* as follows:

> "*Provisional decree distinguished.* A distinction is to be noted between this case and a case where a divorce is, by the law governing it, provisional only until the lapse of a certain time, or the common case of a decree nisi, or the so-called interlocutory decree, which does not become absolute until further proceedings or after the lapse of a certain time. In such a case, neither party ceases to be married until the lapse of the given time, *and neither can marry again in any state, since such marriage would be bigamous.*"

The plaintiff emphasizes the Colorado case of *Bauer vs. Abrahams*, 73 Colo. 509, 216 P. 259. In that case, the Colorado Court was merely called upon to review two conflicting Kansas statutes and determine that the interlocutory period of a Kansas statute was a mere prohibition against remarriage during the period and was not entitled to extraterritorial effect.

A close examination of the other cases reviewed by the plaintiff will indicate that they can be similarly distinguished, and they do not change the rule that whenever the statutory provisions provide or are interpreted to mean that they postpone the dissolution of the marriage ties until the specified time has elapsed, the Courts are uniform in stating that the lack of legal capacity to remarry because of an existing marriage during such period is given extraterritorial effect.

(C) The Validity of a Marriage or a Legitimation Depends Upon the Capacity of the Actor and Not Alone Upon His Outward Acts.

The plaintiff makes much of the argument that a marriage or legitimation must be determined by the law of the domiciliary state. Defendants are willing to concede, for the sake of plaintiff's argument, that generally the validity of a marriage or a legitimation is to be decided by the law of the place where they occur. In this case, the laws of Illinois would apply.

However, the Illinois law can only be used and applied in keeping with the facts and the status in relation to persons as they are found to exist at the time. Plaintiff will agree, that the mere performance of acts in outward compliance with statutes will not accomplish a marriage if the parties so acting are under a legal disability or have no legal capacity to so act. Particularly is this true if in the jurisdiction where an act is attempted, the question of legal capacity has never been raised or determined.

At the time plaintiff attempted to marry in Illinois, his legal status or capacity to marry was not raised, and the mere fact that he went through the procedures of marriage and legitimation based upon such marriage, did not clothe him with the capacity to do so and thereby make such acts valid.

Certainly the laws of Illinois would not sanction or treat as valid a marriage where one of the parties was already married just because the parties went through the required procedure.

It is amply demonstrated by the cases and law referred to above, that the crux of our problem is to determine the legal status or capacity to marry that may or may not have been created by a divorce decree of another jurisdiction. To do this, we must look to the divorce laws of that jurisdiction. This was done by the trial court as set forth in Point I (A) above.

(D) The United States Courts Recognize Decrees of Foreign Countries.

The divorce decree of a foreign country and the *status* thereby created should be recognized by the courts of the United States. The rule in this regard is set forth in Section 959, Page 141 of Vol. 17 (a) *Am. Jur. — Divorce and Separation*:

> "Judgments of courts of foreign countries are recognized in the United States because of the comity due from one nation to another, its courts and judgments. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand and to rights of citizens of the United States and others under the protection of its laws, on the other hand. This rule is frequently applied in divorce cases; a

decree of divorce, granted in one country by a court having jurisdiction to do so, will be given full force and effect in another country by comity, *not only as a decree determining status*, but also with respect to an award of alimony and child support."

(E) The Capacity of Persons to Marry is Determined as of the Date of the Ceremony.

At the time plaintiff attempted to marry the natural mother, the plainttiff had no legal capacity to do so. Further the expiration of the disabling period did not thereafter make the marriage valid. The right of persons to marry is determined as of the date of the ceremony. The rule in this regard is stated in Sec. 182 (a) Page 841 of Vol. 27 C.J.S. — *Divorce*, as follows:

> "Remarriage prior to the date on which the prohibition of the statute or decree terminates is not subsequently validated by removal of the legal barrier since the right to marry is determined as of the date of the ceremony."

Further, in the Utah case of *Hendrich vs. Anderson*, 191 F. 2d 242, it is stated as follows:

> "Where interlocutory divorce decree was entered in wife's divorce action, and decree provided divorce should not become final and absolute until expiration of six months from date thereof, and defendant husband attempt-

ed to marry another woman in sister state before expiration of the six months period, fact that defendant husband and such other woman continued to live together as man and wife after expiration of six months period did not validate attempted marriage, since such marriage was void ab initio."

"A relationship meretricious in its inception is presumed to continue so and burden of proving a subsequent marriage rests on party asserting it."

(F) Child Is Not Issue of An Attempted Marriage.

Plaintiff claims that the child is legitimate by reason of the provisions of Chapter 89, Sec. 17a *Ill. Ann. Stat.* which provides:

"Whenever persons attempt or have attempted to contract and be joined in marriage, and some form of marriage ceremony recognized by law has been performed in apparent compliance with the law in relation to marriage, and pursuant to such attempt to contract and be joined in marriage, cohabit or have cohabited together as husband and wife, and there is issue born after the taking effect of this Act, *as a result of such cohabitation*, such issue is hereby made legitimate and may take the name of the father, though such attempted marriage is declared void or might be declared void, for any reason."

Here again, the uncontroverted facts of this case

do not bring it within the purview of this statute. The application of the statute is fatally defective because to come within the provisions of it, the parents must have *cohabited in pursuance* of a void or voidable marriage and the child must have been born issue as a *result* of such cohabitation. Since the child herein was born *before* there was any attempted marriage, she could not have been the issue of any cohabitation *pursuant to an attempted marriage* as is required by the statutes.

POINT III.

Defendants Have Complied with the Statutory Requirements for the Adoption of an Illegitimate Child.

Under Chapter 30 of Title 78, Utah Code Annotated, 1953, no notice is required to be given to the natural father in the case of an adoption of an illegitimate child.

The record shows that the defendants have fully complied with the provisions of Chapter 30 pertaining to the adoption of an illegitimate child and the plaintiff has not attempted to show otherwise in the proceedings below or in connection with the appeal herein.

POINT IV.

Plaintiff is Not the Natural Father of the Child.

It is submitted that where as here, there is a child conceived and born out of wedlock of questionable paternity, the restrictive rule of evidence that the mother may not testify directly as to non-access does not apply. Counsel has spent many hours trying to find an authority or a case that discusses whether this rule should be applied in such a proceeding to determine the paternity of an admittedly illegitimate child, and he has been unable to find such a case.

Since in a situation such as we have here, the child is admittedly illegitimate, the reason given for the rule disappears. In fact, Wigmore attacks the basis and value of the restrictive rule in any situation. In *Wigmore on Evidence,* 3d ed. Vol. VII. Sec. 2063, he traces the devious development of this present rule and characterizes it as "Lord Mansfield's dogmatic pronouncement." He states that the rule "may have become, in some jurisdictions, too deeply planted to be uprooted" but sets forth:

> "It is agreed, however, on all hands, that the prohibited testimony concerns solely the specific fact of non-access, i.e., testimony to any other fact constituting illegitimacy or to illegitimacy in general is admissible."

In this same authority (Wigmore) at Sec. 133, Vol. I, it is stated:

> "On this principle it is permissible to

show, in a filiation or bastardy prosecution, that the mother had intercourse with another man about the time designated as the period of gestation, for this predicates an equal possibility of conception through someone else's act."

Utah follows the rule "that in a bastardy proceeding, intercourse with others than the defendant within the period of gestation may be shown." *State vs. Hammond*, 46 Utah 249, 148 P. 420.

Defendants contend, therefore, that in determining the paternity of an admittedly illegitimate child as is the case before the Court, the restrictive rule that a mother cannot testify directly as to non-access does not apply, and the Court should be free to consider any competent evidence that would have a bearing on the paternity of the child. However, if it is deemed that the restrictive rule should apply, there is certainly sufficient other testimony and acts of the natural mother and of the plaintiff to support a finding that the plaintiff is not the natural father.

POINT V.

Plaintiff Is Not a Fit and Proper Person To Have Custody of the Child.

The record of this case is replete with evidence reflecting adversely upon the fitness of the plaintiff to have custody of this three and one-half year-old

female child. He cared so little for his first wife and family that while he was still married, he carried on an illicit relation with a seventeen-year-old girl. He apparently has no affection for children as is shown by his leaving his two small children in Germany fatherless. It is submitted that any man who would beat a child black and blue while of the tender age of a few weeks for any reason is not a fit person. The reasons given by the plaintiff for such actions are that the child would cry or would not go to sleep. The plaintiff admits that on one occasion he struck the small girl to an extent sufficient to bruise her, and admits that at least on one occasion the neighbors intervened in the course of his beating the child. The natural mother and her sister testified to many occasions upon which the plaintiff beat the child black and blue, and on one occasion, beat her in the face. On several occasions the neighbors intervened when plaintiff was abusing the child.

The plaintiff frequently left the infant child alone and unattended. He showed great partiality toward a younger child which he knew to be his own. The plaintiff allowed the mother to take the child involved herein with her at the time she left him, and the younger child which he knew to be his, remained in Peoria, Illinois. It is apparent that plaintiff has no real interest in this child, and it was only when he became aware that the mother

intended not to come back to him and intended getting a divorce, that he has become interested in the child as a pawn in the hope of reaching the mother and persuading her to come back to him.

Under the undisputed facts of the record, it can be safely concluded that the plaintiff is not a fit and proper person to have the custody of this child.

POINT VI.

The Best Interests and Welfare of the Child Require that the Defendants Retain Custody of Her.

The Utah courts have always held that the overriding consideration in determining the custody of a minor child is the welfare of the child. In an early case, *Kurtz vs. Christensen*, 209 P. 340, 61 Utah 1, it was held:

> "Even in a case where the parents of the child intermarried after its birth, their right to reclaim the child from persons to whom the mother had given the child shortly after its birth, was denied on the ground that the best interests of the child would be served by leaving it in the possession of such persons."

The rule in regard to child custody cases such as the one here under consideration is well defined in *Walton vs. Coffman*, 169 P. 2d 97 as follows:

> "We conclude that the determining consideration in cases of this kind is: What will be for the best interests and welfare of the child? That in determining this question there is a presumption that it will be for the best interest and welfare of the child to be reared under the care, custody and control of its natural parent; that this presumption is not overcome unless from all of the evidence the trier of the facts is satisfied that the welfare of the child requires that it be awarded to someone other than its natural parent."

In the above case, the custody of two children was given to the maternal grandparents rather than the mother. This rule has been followed in the subsequent cases of *Baldwin vs. Nielson*, 174 P. 2d 437 and *Briggs vs. Briggs*, 181 P. 2d 223.

In the case now under consideration, the trial court after seeing and hearing the witnesses, found that the best interests of the child required that it remain in the custody of the defendants, the adopting parents. In the *Walton vs. Coffman* case, the Court, in making its decision, reiterated the well known rule that in an equity case, the factual record is also before the appellate court for review but that

> "in so doing, we (the Court) should keep in mind that the trial judge saw and heard the witnesses and observed their demeanor and was acquainted with the circumstances surrounding the giving of their testimony, and,

therefore, was in a better position than we are to weigh and evaluate their evidence."

The mother has voluntarily and irrevocably relinquished the custody of the illegitimate child to the defendants. The trial court has found that plaintiff is not the natural father. The plaintiff has failed in one marriage and has turned his back on the children of that marriage. The plaintiff has failed in a second attempted marriage. Plaintiff shows a history of brutality, neglect and lack of interest in the child and a desire to use the child to serve his own ends with her mother. At best, his ability and capacity to care for the small girl would be makeshift and uncertain. The life of this young child with the plaintiff would have all the "built in" elements that lead to unhappiness, heartache, maladjustment and disaster for the child.

The defendants have had custody of this three and one-half year-old child for almost a year and one-half by order of the Court in the adoption proceedings. She was sick, nervous and maladjusted and afraid of men when she was placed with the defendants. They have carefully and lovingly cared for her so that she is now happy, contented and well-adjusted. The defendants have the ability and capacity to provide ideal care and home for the child. They are devoted and deeply attached to her and love her as their own.

CONCLUSION

It is respectfully submitted that the plaintiff has no legal claim to the child for the reasons set forth above in Points I through IV. Further, the best interests of the child require that the child remain with the defendant adopting parents for the reasons set forth above in Points V and VI.

For the foregoing reasons, it is respectfully submitted that the Decision and Order of the Trial Court should be affirmed.

Respectfully submitted,

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